83-1472

No._____

IN THE

Supreme Court of the United States

October Term, 1983

NORTH CAROLINA *ex rel.* CHARLES E. HORNE, Individually, and on behalf of all others similarly situated, for the benefit of the City of Charlotte and the County of Mecklenburg, North Carolina,

Appellant,

v.

BETTY CHAFIN, HARVEY GANTT, MILTON SHORT, PAT LOCKE, DON CARROLL, CHARLES DANELLY, RON LEEPER, DR. LAURA FRECH, MINETTE TROSCH, GEORGE SELDEN, THOMAS COX, JR., Individually, and as Members of the Charlotte City Council, KENNETH R. HARRIS, Individually, and as Mayor of the City of Charlotte, EDWIN H. PEACOCK, ANN THOMAS, ELISABETH HAIR, W. THOMAS RAY, Individually, and as Members of the Board of County Commissioners of the County of Mecklenburg, and THE CHARLOTTE CHAMBER OF COMMERCE, a corporation,

Appellees.

ON APPEAL FORM THE SUPREME COURT OF NORTH CAROLINA

JURISDICTIONAL STATEMENT *and* APPENDIX

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QUESTIONS PRESENTED

Whether advocating the adoption of legislation is a political or ideological activity under the First Amendment to the Constitution of the United States.

Whether a state statute authorizing public funds derived from taxes to be expended for the purpose of advocating the adoption of legislation, and the expenditure of public funds pursuant thereto, contravenes the First and Fourteenth Amendments to the Constitution of the United States.

PARTIES

All parties to this appeal are listed in the caption of the case, except that the Attorney General of North Carolina may be authorized to intervene under the authority of Section 2403(b) of Title 28 of the United States Code.

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No. _____

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NORTH CAROLINA *ex rel.* CHARLES E. HORNE, Individually, and on behalf of all others similarly situated, for the benefit of the City of Charlotte and the County of Mecklenburg, North Carolina,

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

JURISDICTIONAL STATEMENT *and* APPENDIX

CHARLES E. HORNE respectfully appeals the decision of the Supreme Court of North Carolina in the above captioned case.

DECISIONS BELOW

The judgment of the Superior Court of Mecklenburg County is not reported, and is set forth at pages A-10 and A-11 of the Appendix. The opinion of the Court of Appeals of North Carolina has been reported at 62 N.C. App. 95 and at 302 S.E.2d 281, and is set forth at pages A-4 through A-9 of the Appendix. The opinion of the Supreme Court of North Carolina has been reported at _____ N.C. _____ at and 309 S.E.2d 239, and is set forth at pages A-1 through A-3 of the Appendix.

JURISDICTION

This proceeding is an appeal from the judgment of the Supreme Court of North Carolina dated December 6, 1983. Notice of Appeal to this Court was filed in the Supreme Court of North Carolina on February 29, 1984.

This Court has jurisdiction under Section 1257(2) of Title 28 of the United States Code, because the Supreme Court of North Carolina found that a state statute, N.C.G.S. 120-47.8(3), which authorizes the use of funds derived from taxation for lobbying, is not repugnant to the First and Fourteenth Amendments to the Constitution of the United States.

This Court has jurisdiction under the rule, affirmed in *Massachusetts v. Mellon,* 262 U.S. 447, 486 (1923), and reaffirmed in *Doremus v. Board of Education,* 342 U.S. 429, 434 (1957), that resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation where there is a measureable appropriation or disbursement of funds occasioned solely by the activities complained of.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT I, Constitution of the United States

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or

abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1, AMENDMENT XIV, Constitution of the United States

... nor shall any State deprive any person of life, liberty, or property, without due process of law..."

Chapter 120, Section 47.8(3), North Carolina General Statutes

"The provisions of this Article shall not be construed to apply to any of the following:

...

(3) A duly elected or appointed official or employee of the State, the United States, a county, municipality, school district or other governmental agency, when appearing solely in connection with matters pertaining to his office and public duties."

STATEMENT OF THE CASE

On April 24, 1979, the City Government of Charlotte, North Carolina, and the County Government of Mecklenburg County, North Carolina, hosted a legislative reception honoring a local state senator who had recently been elected President Pro-Tempore of the North Carolina Senate. The acknowledged purpose of the reception was to assist in persuading the members of the North Carolina General Assembly to enact a legislative package previously approved by city and country officials. This package consisted of statewide legislation—including tax legislation as well as local bills. The reception cost the city and the county $2603.15 each, which was paid out of funds derived from taxes paid in part by appellant Charles E. Horne.

Objecting both to significant parts of this legislative package and to the use of his tax funds to advocate

positions with which he disagreed, Horne brought a civil action in the Superior Court of Mecklenburg County to recover those funds for the taxpayers of the city and county, and to return them to the respective treasuries. The complaint alleged that the expenditures in question:

> (1) were not for a public purpose, as required by Section 2(1) of Article V of the Constitution of North Carolina;
>
> (2) were not authorized by a general law uniformly applicable throughout the state as required by Section 2(5) of Article V of the Constitution of North Carolina; and
>
> (3) were in violation of the First and Fourteenth Amendments to the Constitution of the United States.

Horne brought this action under North Carolina law, *Lewis v. White*, 287 N.C. 625, 216 S.E.2d 134 (1975), and under Section 1983 of Title 42 of the United States Code.

Following discovery, the Superior Court entered summary judgment for appellees.

On appeal, the Court of Appeals of North Carolina held that lobbying served a public purpose and was authorized by a general law in N.C.G.S. 120-47.8(3). With respect to the federal constitutional question, the Court of Appeals ruled that Horne's argument:

> is without merit because defendants were not lobbying to promote an ideological position. They were promoting legislation, mainly consisting of requests for increased state funding of existing programs, to benefit their constituents who presumably are the majority of the voters in Charlotte and Mecklenburg County. Obviously,

> this is not in violation of [Horne's] First Amendment rights.

62 N.C. App. at ____, 302 S.E.2d at 284.

On appeal to the Supreme Court of North Carolina, the question of whether N.C.G.S. 120-47.8(3), as construed by the Court of Appeals, is repugnant to the First and Fourteenth Amendments to the Constitution was explicity raised in oral argument. The Supreme Court of North Carolina affirmed *per curiam*.

SUBSTANTIALITY OF THE QUESTIONS PRESENTED

The question of whether public funds may be used for political and ideological advocacy, over the objection of a dissenting tax payer, requires plenary consideration by this Court because the holding below both conflicts with the holdings of this Court, and such throws into question the validity of federal statutes and regulations on the subject.

1. The holding below ignores the First Amendment principle this court articulated in *Wooley v. Maynard*, 430 U.S. 705 (1977), and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

In *Wooley*, this Court explained that the strictures of *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), were applicable outside of an educational setting:

> We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. ... A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concommitant

> right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."

430 U.S. at 714.

In *Abood*, the Court extended this principle to encompass compelled contributions to the political and ideological operations of a labor union:

> The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes, works no less infringement on their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.... And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections:
>
> > "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what should be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. ..."
>
> These principles prohibit a State from compelling any individual to affirm his belief in God, ... or associate with a political party ... as a condition of retaining public employment. They are no less applicable to the case at bar.

431 U.S. at 234-35 (citations omitted).

This constitutional rule has been applied by a number of courts. *Galda v. Bloustein*, 686 F.2d 159, 161 n.5 (3rd Cir. 1982) (mandatory student fee at state university used to support lobbying); *Schneider v. Collegio de Abrogados de Puerto Rico*, 565 F. Supp. 963 (D.P.R. 1983) (mandatory bar dues used to support lobbying); *Olson v. CWA*, 559 F. Supp. 754 (D.N.J. 1983); *Robinson v. State of New Jersey*, 547 F. Supp. 1297, 1316 (D.N.J. 1982) (union dues used to support lobbying); *Arrow v. Dow*, 544 F. Supp. 458, 459 (D.N.M. 1982) (mandatory state bar dues used to support lobbying); *Gavette v. Alexander*, 477 F. Supp. 1035, 1040 (D.D.C. 1979) (NRA dues used to support lobbying); *Falk v. State Bar of Michigan*, 411 Mich. 63, 305 N.W.2d 201 (1981); *Reynolds v. State Bar of Montana*, 660 P.2d 581 (Mont. 1983); *Review of State Bar*, 334 N.W.2d 544 (Wisc. 1983) (mandatory state bar dues used to support lobbying). *See Rochester Gas & Electric Corporation v. Public Service Commission of the State of New York*, 51 N.Y.2d 823, 413 N.E.2d 359 (1980) (utility fees used for informational advertising). On the other hand, however, several courts have taken a conflicting position. *Muir v. Alabama Educational Television Commission*, 688 F.2d 1033, 1038 (5th Cir. 1982) (*en banc*); *Community-Service Broadcasting of Mid-America, Inc. v. Federal Communications Commission*, 593 F.2d 1107, 1110 n. 17 (D.C. Cir. 1978) (government may promote ideological causes; *Abood* not cited nor discussed). *Peacock v. Georgia Municipal Association, Inc.*, 247 Ga. 740, 279 S.E.2d 434 (1981); *Miller v. Miller*, 87 Cal. App. 3rd 767, 151 Cal. Rptr. 197 (Dist. Ct. App, 1978) (public funds used to support lobbying; neither *Wooley* nor *Abood* cited or discussed). In cases decided before *Wooley* and *Abood*, courts generally held that the use of taxpayers' funds to advocate the adoption (or defeat) of legislation was improper in the context of a referendum. *Miller v. Miller, supra, Stanson v.*

Mott 17 Cal. 3d 130, Cal. Rptr. 697, 551 P.2d 1 (1976); *Mines v. Del Valle*, 201 Cal. 273, 257 P. 530 (1927); *Mountain States Legal Foundation v. Denver School District No. 1*, 459 F. Supp. 357 (D. Colo. 1978) (neither *Abood* nor *Wooley* cited or discussed); *Anderson v. City of Boston*, 376 Mass. 178, 380 N.E.2d 628 (1978), *judgment stayed*, 439 U.S. 1389, *motion to vacate stay denied*, 439 U.S. 951 (1978), *appeal dismissed*, 439 U.S. 1060 (1979); *Citizens to Protect Public Funds v. Board of Education*, 13 N.J. 172, 98 A.2d 673 (1953) (*per* Brennan, J.); *Stewart v. Scheinert*, 84 Misc. 2d 672, 374 N.Y.S.2d 585 (1975); *Stern v. Kramarsky*, 84 Misc. 2d 447, 375 N.Y.S.2d 235 (1975); *Porter v. Tiffany*, 11 Or. App. 542, 502 P.2d 1385 (1972); *Shannon v. City of Huron*, 9 S.D. 356, 69 N.W. 598 (1896); *State ex rel. Port of Seattle v. Superior Court of Washington*, 93 Wash. 267, 160 P. 755 (1916). The courts were divided in the context of lobbying a state legislature. *Fitts v. Commission of the City of Birmingham*, 224 Ala. 600, 141 So. 354 (1932); *Miller v. Miller*, *supra*; *Powell v. City and County of San Francisco*, 62 Cal. 2d 291, 144 P.2d 617 (1944); *Peacock v. Georgia Municipal Association*, *supra*; *Meehan v. Parsons*, 271 Ill. 546, 111 N.E. 529 (1916); *Anderson v. City of Boston*, *supra*; *Reilly v. Ozzard*, 33 N.J. 529, 166 A.2d 360 (1960); (legislative lobbying permitted); *City of Phoenix v. Michael*, 61 Ariz. 238, 148 P.2d 353 356-57 (1944); *City of Glendale v. White*, 67 Ariz. 231, 194 P.2d 435, 437 (1948); *Henderson v. City of Covington*, 14 Bush (Ky.) 312 (1878); *City of Cleveland v. Artl*, 62 Ohio App. 210, 23 N.E.2d 525 (1939); *Field v. City of Shawnee*, 7 Okl. 73, 54 P. 318 (1898) (lobbying of Secretary of Interior; legislative lobbying not permitted).

The limit of this principle in the union context is now before the Court in *Ellis v. Brotherhood of Railway, Airline*

and Steamship Clerks, No. 82-1150, *cert. granted* ___ U.S. ___, 103 S. Ct. 1767 (1983).

The means of compulsion in these cases was the denial of a government benefit, *e.g.*, public education *(Barnette, Galda)*, public employment (*Abood, Robinson*), admission to practice before the courts (*Schneider, Falk, Reynolds, Arrow*), or the use of a motor vehicle on public roads *(Wooley)*. The use of compulsion here is not contingent on the acceptance of a particular government benefit. The means of compulsion here is the full force of the taxing power. Horne has been compelled to contribute directly to the support of an orthodoxy in politics with which he disagrees.

II. Precisely the opposite principle has been embodied in several congressional enactments. For example, Section 1913 of Title 18 of the United States Code prohibits the use of funds appropriated by the Congress directly or indirectly to influence federal legislation. Criminal penalties attach to federal employees who use appropriated funds in violation of its provisions. Similar prohibitions, without explicit criminal penalties, are found in certain authorization statutes, *e.g.*, 5 U.S.C. §4107 (b) (1); 42 U.S.C. §2996e (c) (2); 42 U.S.C. §2996f (a) (5); 47 U.S.C. §399, and in appropriation acts, *e.g.*, District of Columbia Appropriation Act of 1980, Pub. L. No. 96-93, Section 219, 93 Stat. 713, 719; Treasury, Postal Service and General Government Appropriation Act of 1979, Pub. L. No. 95-429, Section 607(a), 92 Stat. 1001.

The Office of Management and Budget has sought to enforce these provisions in an amendment to Circular A-122, 48 *Federal Register* 50860, November 3, 1983. This proposal prohibits the use of appropriated funds to lobby Congress and, with a few exceptions, state legislatures. 48 *Federal Register* 50863. It states among its justifications that:

> ...there are serious constitutional problems with a system that permits tax money to be used for the political expression of private individuals or groups. Americans have the First Amendment right both to engage freely in speech and political expression, and to refrain from speaking, without interference or control on the part of the government or its agents. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).
>
> ...
>
> ...[I]t is a distortion of the marketplace of ideas for the government to use its financial power to "tip the electoral process," *Elrod v. Burns*, 427 U.S. 353, 356 (1976), by subsidizing the political advocacy activities of private organizations and corporations. This proposal will ensure, to the extent consistent with the communications function of government, that taxpayers are not required, directly or indirectly, "to contribute to the support of an ideological cause [they] may oppose." *Abood v. Detroit Board of Education*, 431 U.S. 209, 235-236 (1977).

48 *Federal Register* at 50861.

Provisions of this type been found to violate the First Amendment rights of persons receiving these appropriated funds by at least one court. *League of Women Voters v. Federal Communications Commission*, 547 F. Supp. 379 (C.D. Calif. 1983). At issue in this case was Section 399 of Title 47 of the United States Code, which prohibited advocacy through editorializing in public broadcasts subsidized by the Corporation for Public Broadcasting. Section 399 was adopted to meet the concerns of members of Congress that government-subsidized advocacy—specifically including lobbying—would impinge on First Amendment rights. 113 Cong. Rec. 12990, 12992-93 (May

17, 1967). The district court found that this provision abridged the right of federal grantees to speak freely on any subject, but did not discuss the contention that the provision protects the countervailing right of federal taxpayers not to contribute to advocacy with which they disagree. The government appealed to this Court in No. 82-912. In the Jurisdictional Statement the Solicitor General argued that:

> The prohibition of editorializing serves a second highly important government interest not discussed by the district court: it prevents the use of taxpayers money to promote controversial private views and thus obviates First Amendment problems. In *Abood v. Detroit Board of Education*, 431 U.S. 209, 234-235 (1977), this Court held that citizens may not be compelled to contribute to organizations that promote ideological causes with which the contributors may not agree. This is so because "contributing to an organization for the purpose of spreading a political message," as well as refraining from making such contributions, is protected by the First Amendment (431 U.S. at 234). It might therefore raise constitutional problems to collect tax money from unwilling contributors and then give it to television and radio stations for the purpose of propagandizing concerning editorial positions with which a great many taxpayers might disagree.

Jurisdictional Statement in No. 82-912, at 19-20.

CONCLUSION

The holding of the Supreme Court of North Carolina conflicts with the First Amendment principles announced

by this Court in *Barnette*, *Wooley*, and *Abood*. If affirmed, this holding would undermine, if not entirely dissipate, the constitutional basis for a number of federal strictures on lobbying. The Court should note probable jurisdiction, grant plenary consideration, and reverse.

Respectfully submitted,

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Counsel of Record for Appellant

APPENDIX

SUPREME COURT OF NORTH CAROLINA

NORTH CAROLINA ex rel. CHARLES E. HORNE, Individually, and upon behalf of all others similarly situated, for the benefit of the City of Charlotte and the County of Mecklenburg, North Carolina	)	
v	)	No. 304PA82 -
BETTY CHAFIN, HARVEY GANTT, MILTON SHORT, PAT LOCKE, DON CARROLL, CHARLES DANELLY, RON LEEPER, DR. LAURA FRECH, MINETTE TROSCH, GEORGES SELDEN, THOMAS COX, JR., Individually, and as Members of the Charlotte City Council, KENNETH R. HARRIS, Individually, and as Mayor of the City of Charlotte, EDWIN H. PEACOCK, ANN THOMAS, ELISABETH HAIR, W. THOMAS RAY, Individually, and as Members of the Board of County Commissioners of the County of Mecklenburg, THE CHARLOTTE CHAMBER OF COMMERCE, a Corporation	)	Mecklenburg

Appeal as a matter of right under G.S. 7A-30(1) from the decision of the Court of Appeals, 62 N.C. App. 95, 302

S.E.2d 281 (1983) affirming summary judgment in favor of the defendants entered by Griffin, Judge on 5 January 1982 in Superior Court, Mecklenburg County. Heard in the Supreme Court 9 November 1983.

HUGH JOSEPH BEARD, JR., for the plaintiff appellant.

FRANK B. AYCOCK, III, for the defendant appellees, Chafin, Gantt, Short, Locke, Carroll, Danelly, Leeper, Frech, Trosch, Selden, Cox, and Harris.

RUFF, BOND, COBB, WADE & McNAIR, by JAMES O. COBB and MARVIN A. BETHUNE, for the defendant appellees, Hair, Peacock, Ray and Thomas.

HELMS, MULLIS & JOHNSTON, by ROBERT B. CORDLE, for the defendant appellee, The Charlotte Chamber of Commerce.

PER CURIAM.

The plaintiff brought this action against the defendants alleging that they illegally used tax funds to pay for a reception for members of the General Assembly and others. The plaintiff contends that these funds were used for the purpose of lobbying members of the General Assembly in an effort to induce them to pass legislation affecting the City of Charlotte and Mecklenburg County which legislation was contrary to the plaintiff's beliefs.

The defendants, city council and chamber of commerce members, filed motions under Rule 12(b) (6) to dismiss for failure to state a claim for relief. The plaintiff and the defendant county commissioners filed motions for summary judgment. After considering all materials filed during discovery and the arguments of counsel, the trial

court treated the motions to dismiss under Rule 12(b)(6) as motions for summary judgment and granted summary judgment in favor of all of the defendants. The Court of Appeals affirmed.

It is not necessary that this Court consider or pass upon each of the statements contained in the opinion of the Court of Appeals in order to affirm the result reached therein. The holding of the Court of Appeals affirming summary judgment for the defendants by the trial court is

AFFIRMED.

No. 8226SC463

NORTH CAROLINA COURT OF APPEALS

Filed: 3 May 1983

NORTH CAROLINA et rel. CHARLES E. HORNE, Individually, and upon behalf of all others similarly situated, for the benefit of the City of Charlotte and the County of Mecklenburg, North Carolina

v.

BETTY CHAFIN, HARVEY GANTT, MILTON SHORT, PAT LOCKE, DON CARROLL, CHARLES DANELLY, RON LEEPER, DR. LAURA FRECH, MINETTE TROSCH, GEORGE SELDEN, THOMAS COX, JR., Individually, and as Members of the Charlotte City Council, KENNETH R. HARRIS, Individually, and as Mayor of the City of Charlotte, EDWIN H. PEACOCK, ANN THOMAS, ELISABETH HAIR, W. THOMAS RAY, Individually, and as Members of the Board of County Commissioners of the County of Mecklenburg, THE CHARLOTTE CHAMBER OF COMMERCE, a Corporation

Mecklenburg County
No. 81CVS3704

Appeal by plaintiff from Griffin, Judge. Judgment entered 5 January 1982 in Superior Court, Mecklenburg County. Heard in the Court of Appeals 14 March 1983.

Plaintiff brought this action against the City Council of Charlotte, the Mayor of Charlotte, the Board of County Commissioners of Mecklenburg County, the Charlotte Chamber of Commerce, and the individual members

thereof, alleging they illegally used a total of $7,809.44 of public funds to pay for a reception honoring the North Carolina General Assembly and State Senate President Pro Tem W. Craig Lawing. The uncontradicted facts are as follows. The reception was held on 24 April 1979. The following people, and their spouses, were invited: all the members of the General Assembly, the Council of State, Senate officials, County officials, Judges of the North Carolina Court of Appeals, Justices of the North Carolina Supreme Court, Senate and House Sergeants-at-Arms' staff, legislative staff members, the Lieutenant Governor's staff, the Speaker's office staff, the House and Senate Principal Clerks' office staff, the General Assembly Librarian, and several special invitations for Lawing's friends and relatives. The cost of the reception was split evenly by the City, the County, and the Chamber of Commerce.

The total cost, $7,809.44, included rental of a hall in the Releigh Civic Center, food and refreshments, entertainment, a chartered bus, miscellaneous expenses, and travel expenses.

According to defendants, the purpose of the reception was to promote legislative goals of the City of Charlotte and Mecklenburg County. These goals included increasing state aid for Medicaid sponsorship, state funding for the Mecklenburg Mental Health Inpatient program, increasing the daily wage for substitute teachers, increasing the interest rate on delinquent taxes, and increasing the state funding for foster care. Almost all the goals involved increasing state participation in existing social programs.

The City Council and Chamber of Commerce defendants filed Rule 12(b) (6) motions to dismiss for failure to state a claim for relief. Plaintiff and the County Commissioner defendants filed motions for summary judgment. The trial

judge, considering all the materials filed in discovery and the arguments by counsel for all the parties, treated the Rule 12(b) (6) motions as motions for summary judgment and granted all the defendants' motions for summary judgment.

Hugh Joseph Beard, Jr., for plaintiff appellant.

City Attorney Henry W. Underhill, Jr., for defendant appellee, Charlotte City Council.

Frank B. Aycock III, for defendant appellees, City Council members, Chafin, Gantt, Short, Locke, Carroll, Danelly, Leeper, Frech, Trosch, Selden, Cox and Harris.

Ruff, Bond, Cobb, Wade and McNair, by James O. Cobb, for defendant appellees, County Commissioners Hair, Peacock, Ray and Thomas.

Helms, Mulliss and Johnston, by Robert B. Cordle, for defendant appellee, Charlotte Chamber of Commerce.

VAUGHN, Chief Judge.

The sole question is whether the trial court erred in granting defendants' motions for summary judgment. Summary judgment shall be rendered if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). Since the facts are not at issue, the only question is whether defendants are entitled to a judgment as a matter of law.

Plaintiff argues that the expenditure of public funds for the reception violates Article V, Sections 2(1) and 2(5) of the North Carolina Constitution. Section 2(1) provides: "Power of taxation. The power of taxation shall be exercised in a

just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away." Although this section refers only to the power of taxation, the power to appropriate money from the treasury is no greater than the power to levy the tax. Mitchell v. North Carolina Industrial Development Financing Authority, 273 N.C. 137, 159 S.E. 2d 745 (1968). Plaintiff contends that the expenditure for the reception was not for a public purpose and thus violated Article V, Section 2(1) of the North Carolina Constitution. "[F]or a use to be public its benefits must be in common and not for particular persons, interests, or estates; the ultimate net gain or advantage must be the public's as contradistinguished from that of an individual or private entity." Martin v. North Carolina Housing Corp., 277 N.C. 29, 43, 175 S.E. 2d 665, 673 (1970). The purpose of the reception was to influence the General Assembly to pass legislation which, as seen by defendants, was favorable to Charlotte and Mecklenburg County residents. We have found no North Carolina cases on this issue, however, a recent Georgia Supreme Court opinion addresses this point. In the Georgia case, Peacock v. Georgia Municipal Association, Inc., 247 Ga. 740, 279 S.E. 2d 434 (1981), the plaintiffs alleged that defendant, whose members were 400 towns and cities in Georgia, was illegally using public funds in various lobbying activities to influence the state legislators. The Supreme Court of Georgia held that the activities carried out by defendant were necessary activities for the administration of local governments, and representing the views of the constituents to the legislators on pending issues was one of the functions of officers of municipalities and counties. We agree with the Georgia Supreme Court. Local government officials have a duty to represent their constituents, and presenting local interests to the state legislators in hope of getting favorable bills passed in the General Assembly is obviously a public and not a

private purpose. The alleged extravagance of the reception does not convert the public purpose to a private one. Plaintiff's remedy is to air his opinion at the ballot box.

Plaintiff argues that defendants' expenditures also violated Article V, Section 2(5) of the North Carolina Constitution. That section provides:

> Purposes of property tax. The General Assembly shall not authorize any county, city or town, special district, or other unit of local government to levy taxes on property, except for purposes authorized by general law uniformly applicable throughout the State, unless the tax is approved by a majority of the qualified voters of the unit who vote thereon.

Plaintiff contends this was violated because the expenditure was not a "purpose authorized by general law." Defendants contend, and we agree, that lobbying is authorized by general law, by implication, in G.S. 120-47.8(3), which exempts from the registration requirements imposed on lobbyists. "A duly elected or appointed official or employee of the State, the United States, a county, municipality, school district or other governmental agency, when appearing solely in connection with matters pertaining to his office and public duties." Since lobbying by city and county officials is permitted, Article V, Section 2(5) was not violated. Urging policies which benefit their constituents is one of the ways local officials promote their constituents' interests.

Plaintiff's third argument is that defendants' expenditures violated his First Amendment rights through the Fourteenth Amendment of the Federal Constitution. He argues that the First Amendment protects a person's right against being compelled to speak, and these expenditures were made to promote ideological positions contrary to his

viewpoint. Without addressing the question of whether plaintiff, as a taxpayer, has standing to raise this issue, it is clear that his argument is without merit because defendants were not lobbying to promote an ideological position. They were promoting legislation, mainly consisting of requests for increased state funding for existing programs, to benefit their constituents who presumably are the majority of the voters in Charlotte and Mecklenburg County. Obviously, this is not in violation of plaintiff's First Amendment rights.

Since we agree with the trial court that there is no issue of fact, and defendants are entitled to judgment as a matter of law, there is no need to address the issue of defendants' immunity.

Affirmed.

Judges WEBB and EAGLES concur.

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
81-CVS-3704

NORTH CAROLINA ex rel. CHARLES E. HORNE, Individually, and upon behalf of all others similarly situated, for benefit of the City of Charlotte and the County of Mecklenburg, North Carolina,	)	
	)	JUDGMENT
Plaintiff,	)	
v.	)	
BETTY CHAFIN, et al.,	)	
Defendants.	)	

This cause came on to be heard and was heard by the undersigned Judge Presiding over the December 14, 1981, Civil Jury Session of the Superior Court Division for Mecklenburg County;

And this cause was heard upon a motion for summary judgment filed on behalf of the plaintiff, a motion for summary judgment filed on behalf of the defendants Hair, Peacock, Ray, and Thomas, a Rule 12(b)(6) motion filed on behalf of The Charlotte Chamber of Commerce, and upon a Rule 12(b)(6) motion filed on behalf of all remaining defendants;

And the undersigned having considered the record in this cause, including the materials filed in connection with discovery, having studied the legal memoranda filed by the parties, and having heard arguments of counsel for all parties;

And the undersigned having considered matters outside the pleadings (the materials produced by discovery), and having determined that the Rule 12(b)(6) motions filed on behalf of The Charlotte Chamber of Commerce and on behalf of the defendants other than Hair, Peacock, Ray, and Thomas should be treated as motions for summary judgment pursuant to Rules 12(b) and 56;

And the undersigned having concluded that there is no genuine issue as to any material fact and resolution of this case by summary judgment is appropriate;

And the parties having stipulated in open court that the judgment may be signed and entered after the Session at which the hearing was held;

And the undersigned having concluded that the plaintiff's motion for summary judgment should be denied as a matter of law and that the defendants' motions for summary judgment should be granted as a matter of law;

It is hereby ORDERED, ADJUDGED, and DECREED that the plaintiff's motion for summary judgment be and the same hereby is denied and that the defendants' motions for summary judgment should be and the same hereby are granted; and it is further ORDERED, ADJUDGED, and DECREED that this action is dismissed with prejudice to the plaintiff and with the plaintiff to be taxed with the court costs.

This 5 day of January, 1982.

/s/ Kenneth A. Griffin

Superior Court Judge

No. 304PA83 TWENTY-SIXTH DISTRICT

IN THE

SUPREME COURT OF NORTH CAROLINA

NORTH CAROLINA ex rel.
CHARLES E. HORNE,
Individually, and upon behalf
of all others similarly
situated, for the benefit of
the City of Charlotte and
County of Mecklenburg,
North Carolina,

v.

BETTY CHAFIN, et al.

NOTICE OF APPEAL

NOW COMES the Appellant herein, the State of NORTH CAROLINA ex rel. CHARLES E. HORNE, Individually, and on behalf of all others similarly situated, for the benefit of the City of Charlotte and the County of Mecklenburg, North Carolina, through Counsel and pursuant to Section 1257(2) of Title 28 of the United States Code and Rule 10 of the Rules of the Supreme Court of the United States, and gives Notice of Appeal to the Supreme Court of the United States from the Judgement of the Supreme Court of North Carolina entered in this cause on December 6, 1983.

This 29 day of February, 1984.

/s/ William R. Titchener
WILLIAM R. TITCHENER
Seay, Rouse, Harvey &
Titchener
Post Office Box 18807
Raleigh, North Carolina
27619
(919) 782-6700

[Filed in the Office of the Clerk, Supreme Court of North Carolina, at 3:19 P.M., February 29, 1984.]

STATEMENT AND CERTIFICATE OF SERVICE

Several of the defendants appellees have sued as officers of the City of Charlotte or of the County of Mecklenburg, both of which are political subdivisions of the State of North Carolina. Nevertheless, Section 2403(b) of Title 28 of the United States Code may be applicable. For this reason, service has been made on the Attorney General of North Carolina pursuant to Rule 28.4(b) of the Rules of the Supreme Court of the United States.

I hereby certify that one—(1)—copy of the foregoing and attached NOTICE OF APPEAL has been duly served on each party to this civil action and on the Attorney General of North Carolina pursuant to Rule 28 of the Rules of the Supreme Court of the United States by depositing the same in an United States mailbox, with first class postage prepaid, addressed to the counsel of record for each party and to the Attorney General of North Carolina, as follow:

Frank B. Aycock, III, Esq.
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James O. Cobb, Esq.
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Charlotte, North Carolina
28282

Robert B. Cordle, Esq.
2800 NCNB Plaza
Charlotte, North Carolina
28280

Hon. Rufus Edmisten
Attorney General of No. Car.
Post Office Box 829
Raleigh, North Carolina

This 29th day of February, 1984.

/s/ William R. Titchener
WILLIAM R. TITCHENER
Seay, Rouse, Harvey &
Titchener
Post Office Box 18807
Raleigh, North Carolina
27619
(919) 782-6700

CERTIFICATE OF SERVICE

Several of the defendants appellees have been sued as officers of the City of Charlotte or of the County of Mecklenburg, both of which are political subdivisions of the State of North Carolina. Nevertheless, Section 2403(b) of Title 28 of the United States Code may be applicable. For this reason, service of the Notice of Appeal and of the Jurisdictional Statement has been made on the Attorney General of North Carolina pursuant to Rule 28.4(b) of the Rules of the Supreme Court of the United States.

I hereby certify that three (3) copies of the foregoing and attached JURISDICTIONAL STATEMENT have been duly served on each party to this civil action and on the Attorney General of North Carolina pursuant to Rule 28 of the Rules of the Supreme Court of the United States by depositing the same in an United States mailbox, with first class postage prepaid, addressed to the counsel of record for each party and the Attorney General of North Carolina, as follow:

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Counsel of Record for Appellant

No. 83-1472

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NORTH CAROLINA ex rel. CHARLES E. HORNE, Individually, and on behalf of all others similarly situated, for the benefit of the City of Charlotte and the County of Mecklenburg, North Carolina,

Appellant,

v.

BETTY CHAFIN, HARVEY GANTT, MILTON SHORT, PAT LOCKE, DON CARROLL, CHARLES DANELLY, RON LEEPER, DR. LAURA FRECH, MINETTE TROSCH, GEORGE SELDEN, THOMAS COX, JR., Individually, and as Members of the Charlotte City Council, KENNETH R. HARRIS, Individually, and as Mayor of the City of Charlotte, EDWIN H. PEACOCK, ANN THOMAS, ELISABETH HAIR, W. THOMAS RAY, Individually, and as Members of the Board of County Commissioners of the County of Mecklenburg, and THE CHARLOTTE CHAMBER OF COMMERCE, a corporation,

Appellees,

ON APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

MOTION OF APPELLEES TO DISMISS OR AFFIRM

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No. 83-1472

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

NORTH CAROLINA ex rel. CHARLES E. HORNE, Individually, and on behalf of all others similarly situated, for the benefit of the City of Charlotte and the County of Mecklenburg, North Carolina,

Appellant,

v.

BETTY CHAFIN, HARVEY GANTT, MILTON SHORT, PAT LOCKE, DON CARROLL, CHARLES DANELLY, RON LEEPER, DR. LAURA FRECH, MINETTE TROSCH, GEORGE SELDEN, THOMAS COX, JR., Individually, and as Members of the Charlotte City Council, KENNETH R. HARRIS, Individually, and as Mayor of the City of Charlotte, EDWIN H. PEACOCK, ANN THOMAS, ELISABETH HAIR, W. THOMAS RAY, Individually, and as Members of the Board of County Commissioners of the County of Mecklenburg, and THE CHARLOTTE CHAMBER OF COMMERCE, a corporation,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

MOTION OF APPELLEES TO DISMISS OR AFFIRM

MOTION

The appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of North Carolina on the ground that it is manifest that the questions upon which the decision of this cause depends are so unsubstantial as not to need further argument.

I.

STATEMENT OF RELEVANT FACTS AND STATEMENT OF QUESTIONS PRESENTED

The County of Mecklenburg and the City of Charlotte each paid one-third ($2,603.15) of the cost of a reception which honored the 1979 North Carolina General Assembly, the Mecklenburg County Delegation to the 1979 General Assembly,

and 1979 State Senate President Pro Tem W. Craig Lawing. The remaining one-third of the reception cost was paid with private funds from the Charlotte Chamber of Commerce.

The motion to dismiss should be granted as to The Charlotte Chamber of Commerce because the Chamber is a private, voluntary entity; and its contribution of one-third of the cost of the legislative reception lacks forced association elements and lacks public money. Indeed, the Jurisdictional Statement omits all contentions with respect to this appellee.

The remainder of this motion pertains to all other appellees, who were members of the Charlotte City Council, the Mayor of the City of Charlotte, and members of the Board of County

Commissioners of Mecklenburg County at the time of the legislative reception.

The ultimate purpose of the reception was to enhance the attainment of the legislative goals of the Board of County Commissioners and the City Council as set forth in their published legislative programs. Most of the goals involved increasing state participation in existing social programs. The reception bore no relationship to the election of any candidate, to any referendum, to any political party, or to any attempt to influence citizens and voters. Lesser levels of state government sought the favor of the highest level of state government with respect to matters which directly affected the lesser levels but which were controlled by the highest level.

The Supreme Court of North Carolina has ruled that a North Carolina statute permits a majority of an elected county commission or a majority of an elected city council to use public money from the respective county or city treasury for the purpose of lobbying the elected members of the North Carolina General Assembly with respect to proposed state legislation, which would directly affect such county or city. Two questions are produced. First, did such limited lobbying with public funds by a local legislature of the state legislature curtail any of a taxpayer's First Amendment rights? Second, if so, is such minimal curtailment permitted because the lobbying and concomitant expenditure of public money were germane to the duties, responsibilities and obligations of the local legislators?

II.

ARGUMENT IN FAVOR OF GOVERNMENTAL APPELLEES' MOTION TO DISMISS: THE FEDERAL QUESTION EITHER IS NONEXISTENT OR IS UNSUBSTANTIAL

The appellant contends that the use of public money to seek or oppose legislation before the North Carolina General Assembly forces him to support financially the propagation of views with which he disagrees. Since Mr. Horne must support the public treasury with his taxes, he contends that he is being forced to "associate" with views repugnant to his own.

The appellant's argument overlooks the fact that our constitutional system of representative government and of majority rule negates any First Amendment right by a taxpayer to disassociate

himself financially from the decisions of his elected representatives that are within the scope of the constitutional and statutory duties which these individuals were elected to exercise. Such decisions of our elected officials represent the will of the majority that elected them. Accordingly, all citizens must abide by such decisions, including those calling for payment of taxes and the expenditure of public money, whether they agree with them or not. The decision by the appellees to appropriate funds to promote the 1979 legislative agenda was germane to the core governmental functions which the appellees were to administer; and the appellant is required to support that decision through payment of any taxes levied by law.

The freedom of speech and belief guaranteed by the First Amendment does not give citizens the option to cease payment of taxes simply because they disagree with expenditures made by their elected representatives pursuant to their constitutional and statutory duties. If such were the case, our elected representatives would be unable to govern. Rather, the First Amendment gives citizens the right to disagree publicly and privately with the decisions of their elected representatives and to vote such representatives out of office at the ballot box if there is widespread dissatisfaction.

The "forced association" issue raised by Mr. Horne results from a fundamental misunderstanding of Abood v. Detroit Board of Education, 431 U.S. 209

(1977). Abood held that a non-union public employee could be compelled to finance collective bargaining activities but could not be compelled consistent with the First Amendment to support financially the advancement of ideological causes and other activities and decisions of the collective bargaining unit which were not "germane to its duties as collective-bargaining representative." (431 U.S. at 235). Justice Powell put his finger squarely upon the distinction between Mr. Abood and Mr. Horne in footnote 13 of the three Justice "concurring in judgment" opinion in Abood:

> Compelled support of a private association is fundamentally different from compelled support of government. Clearly, a local school board does not need to demonstrate a compelling state interest every time

> it spends a taxpayer's money in ways the taxpayer finds abhorrent. But the reason for permitting the Government to compel the payment of taxes and to spend money on controversial subjects is that the Government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. The withholding of financial support [to a union] is fully protected as speech in this context. (431 U.S. at 259).

Taken to its logical conclusion, Mr. Horne's contention would require the individual County Commissioners and City Council members to communicate with the North Carolina General Assembly upon legitimate public business with their own private funds for postage stamps, long distance telephone calls, and stenographic assistance; and even such expenditures might be questionable if the private funds so spent were derived from governmental salaries.

The Jurisdictional Statement cites West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), and Wooley v. Maynard, 430 U.S. 705 (1977). We fail to see the relevance of either case. In West Virginia State Board, public school children were required to pledge allegiance to the United States and salute the flag or be expelled from school; moreover, such expulsions were unlawful absences for which parents and guardians incurred criminal liability. Wooley required individuals to display the New Hampshire motto on their private motor vehicle license plates even though the motto was repugnant to the moral and religious beliefs of some persons. The school children and their parents in West

Virginia and Mr. Maynard in New Hampshire had First Amendment rights to remain silent. Mr. Horne, however, lacks a similar right to declare himself immune from the portion of local taxes that is used to seek and to oppose legislation with which he disagrees. Mr. Horne goes beyond an effort to recover his own taxes; he seeks to prohibit any financial support from any local taxpayer for the lobbying effort.

The appellant's First Amendment claim is a mirage. The governmental appellees' motion to dismiss the appeal should be granted.

III.

ARGUMENT IN SUPPORT OF GOVERNMENTAL APPELLEES' MOTION TO AFFIRM: THE EXPENDITURES OF PUBLIC MONEY WERE GERMANE TO THE GOVERNMENTAL APPELLEES' CONSTITUTIONAL AND STATUTORY DUTIES AS ELECTED OFFICIALS

If we ignore Justice Powell's footnote in Abood, supra, if we equate Mecklenburg County and the City of Charlotte with a labor union, and if we treat Mr. Horne as a non-labor union member who is required to make certain payments equivalent to initiation fees and union dues, the Abood, supra, decision nevertheless requires affirmance of the decision below.

The Abood Court said:

> To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on

the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines designed to limit inflation, or might object to the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination. The examples could be multiplied. To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in Hanson and Street is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. 'The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy.' (citation omitted) (431 U.S. at 222-223).

The Abood Court held that the First Amendment prohibited compelled financial support for the advancement of ideological causes and other activities and decisions of the collective bargaining unit, which were not germane to its duties as collective bargaining representative. The Court noted th. there would be "difficult problems in drawing lines between collective bargaining activities for which contributions may be compelled, and ideological activities unrelated to collective bargaining for which such compulsion is prohibited." (431 U.S. at 236).

Abood is a public employment case; Mr. Horne has brought a citizenship case. Even if the two cases involve the same constitutional principles, the appellant

must do more than simply state that he disagreed with the legislative changes sought by the governmental appellees through their lobbying activity with the North Carolina General Assembly. Mr. Horne must specifically allege and prove that the legislative changes were not germane to the legislative obligations and duties of the appellees. No such allegations have been made. Common sense alone leads one to conclude that the quest for greater state participation in various existing social programs is well within the range of decisions that the appellees were elected to make and, hence, did not touch impermissibly upon the First Amendment rights of any person. The forced association of which Mr. Horne complains - payment of taxes to a government whose policies and expenditures the

taxpayer opposes - is constitutionally required.

We are unable to see how the North Carolina state court decision below has any effect upon the federal legislation and the federal regulations mentioned in the Jurisdictional Statement. Affirmance of the decision below will establish only that the North Carolina Legislature may authorize counties and cities in North Carolina to spend public funds to seek and to oppose state legislation that directly affects such counties and cities.

The governmental appellees' alternative motion to affirm the judgment below should be allowed.

IV.

CONCLUSION

The appellees move that the appeal be dismissed as to each of them. Alter-

natively, the appellees move that the judgment of the Supreme Court of North Carolina should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing and attached MOTION OF APPELLEES TO DISMISS OR AFFIRM have been duly served upon the appellant and upon the Attorney General of North Carolina pursuant to U.S. Sup. Ct. Rule 28.5(b) by depositing the same in an United States mailbox, with first class postage prepaid, addressed to counsel of record for the appellant and to the Attorney General of North Carolina, as follows:

Edwin Vieira, Jr.
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Hon. Rufus Edmisten
Attorney General of North Carolina
Post Office Box 629
Raleigh, North Carolina 27602

This 26th day of March, 1984.

JAMES O. COBB
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Counsel of Record for Appellees